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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 467

ROBERT R. KAUFMAN,

Petitioner,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Appellate Division, First Department (hereinafter refered to as "the Appellate Division"), made and entered on March 25, 1969, denying petitioner's motion for an order recalling its order disbarring petitioner made and entered on February 3, 1966, and for other relief. On May 15, 1969, the Court of Appeals of the State of New York entered orders denying petitioner's motion for leave to appeal and granting respondent's motion to dismiss an appeal taken as of right.

Statement of the Case

Although a statement of the case is contained in the petition, respondent finds it necessary, in accordance with Rule 40 (3) of the Revised Rules of this Court, to submit a supplemental statement setting forth additional facts which, in respondent's view, are essential to a determination of the petition.

Charge VIII of the supplemental petition in the proceeding which resulted in petitioner's disbarment alleged, in substance, that petitioner had converted to his own use, without authority, the sum of $5,275, representing his clients' (Mr. and Mrs. Gagliano) share of a settlement in a negligence case. It was further charged that petitioner had falsely represented to counsel for respondent's Committee on Grievances investigating the matter that one of the clients (Mr. Gagliano) had authorized petitioner to borrow the clients' share of the settlement and had signed a statement to that effect. Petitioner denied the charge and alleged that he had, in fact, borrowed the clients' share with permission and that his inability to furnish the purported signed statement to that effect was due to its having been mislaid.

In order to corroborate his claim that he had borrowed rather than converted the clients' share of the settlement, petitioner produced a witness, one Michael Manente, who testified, in substance, that he had been present when the alleged loan was agreed to by Mr. Gagliano. Mr. Gagliano, on the other hand, testified that he had never authorized petitioner to use the clients' share of the settlement and had never signed any statement granting such authority.

The referee received, without objection, evidence of communications between petitioner and the clients in the course of their relationship for such bearing as it might have upon the charge of conversion. The testimony disclosed that petitioner had delivered to the clients an assignment of a portion of the proceeds of a fire loss to repay their share of the settlement (Ex. 36; Min. p. 940). The assignment was dated May 11, 1964. Petitioner testified that this assignment had been issued when Mr. Gagliano "asked me for something to assure him that he was going to be paid his money . . ." (Min. p. 1321). Petitioner thereafter had the client sign a statement (Ex. II; Min. p. 1202) accepting that assignment and another as payment in full of the clients' share of the settlement on the basis of which he intended to file a closing statement[1] with the Appellate Division concluding the negligence case (Min. p. 1286).

The evidence before the referee further disclosed that petitioner had issued partial assignments of the proceeds of the same fire loss to various individuals in addition to the clients whose complaint was the subject of the charge. In cross-examining petitioner, respondent offered in evidence another such assignment (Ex. 50; Min. p. 1554), dated April 29, 1964, thereby antedating the assignment tendered to Mr. Gagliano. This assignment (Ex. 50) was witnessed by Michael Manente, the witness who had testified on behalf of petitioner.

Respondent contended that the assignment in question (Ex. 50), together with the other assignments of portions of

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[1] The Rules of the Appellate Division require that such statement be filed after distribution of the proceeds of the recovery has been made.

the same fire loss also tendered prior to the assignment issued to the clients, would use up all available proceeds of that loss, thereby rendering the clients' assignment worthless. To refute that contention, petitioner attempted to show that there were in fact sufficient proceeds available from the fire loss to pay the assignment given to the clients (Ex. 36), contending that the assignment in question (Ex. 50) had actually been tendered after the assignment to the clients but had been pre-dated (Min. pp. 1554-5):

> It was on the basis of this pre-dating of the assignment (Ex. 50) to give it a priority which it did not deserve that the referee characterized it as "fraudulent" and his rejection of the testimony given by petitioner's witness, Michael Manente, that he was present when Mr. Gagliano authorized petitioner to use the clients' share of the settlement was, in part, predicated upon the fact that Manente had witnessed the falsely dated assignment (Referee's report, p. 34).

Following the filing of the referee's report, respondent moved to confirm and to discipline petitioner. Petitioner opposed that motion, filing a brief in support of his contentions. No issue was therein raised concerning the "fraudulent assignment", the sole issue which is the subject of the present petition. This claim was first raised by petitioner in his brief (pp. 36-8) in support of his motion for leave to appeal to the Court of Appeals of the State of New York from the original order of disbarment which was denied by order of the Court of Appeals on March 31, 1966. The same contention was thereafter advanced by petitioner in the Appellate Division in support of his motion for a new trial and related relief which was denied on June 16, 1966, an appeal from which was dismissed by

order of the Court of Appeals of the State of New York on December 30, 1966. A similar contention was raised by petitioner in support of his motion for reargument of the prior order of the Appellate Division denying his motion for a new trial and related relief which was, in turn, denied on November 22, 1966, an appeal from which was dismissed by the Court of Appeals of the State of New York on January 12, 1967. Thereafter, on November 6, 1967, petitioner filed a petition for a writ of certiorari in this Court in which he completely abandoned any claim predicated upon the "fraudulent assignment". The petition was denied by order of this Court entered January 15, 1968.

ARGUMENT

I.

Petitioner did not timely raise the claim underlying the petition for certiorari.

The petition is predicated upon alleged errors contained in the referee's report. Consequently, petitioner had the opportunity to raise his contentions with respect thereto in the course of the proceedings in the Appellate Division with respect to respondent's motion to confirm the referee's report and to discipline petitioner. Nevertheless, no such contention was then raised.

The claim was thereafter advanced by petitioner in the course of unsuccessful proceedings in the Court of Appeals of the State of New York and in the Appellate Division seeking to vacate the order of disbarment made during the period between February 1966, when petitioner was disbarred, and January 12, 1967, when the Court of Ap-

peals of the State of New York dismissed petitioner's appeal from an order of the Appellate Division denying petitioner's motion for reargument of a prior order of the Appellate Division denying a motion for a new trial and related relief. Even assuming, *arguendo,* that up to this point petitioner had timely raised the claim, he thereafter categorically abandoned it when he subsequently petitioned this Court for certiorari to the Appellate Division to review the denial of still another motion to vacate the order of disbarment and related relief in which no claim predicated upon the "fraudulent assignment" was raised. As the present petition submitted to this Court concedes (p. 3), the prior petition for a writ of certiorari was limited to the contention that incriminating testimony allegedly obtained by coercion had been used in the course of the disciplinary proceeding in violation of petitioner's rights under the Fifth Amendment.

Petitioner seeks to circumvent his failure to timely raise the issue which he now atempts to pursue by contending that the decision in *In re Ruffalo,* 390 U. S. 544, decided on April 8, 1968, constitutes, "a supervening event" which, in his words, "renders timely" petitioner's raising of this constitutional issue by his motion of February 3, 1969 in the Appellate Division. This contention, made without any disclosure that the same issue had been repeatedly raised by petitioner prior to the decision in *Ruffalo,* is followed by citations to two decisions of this Court, *State Farm Ins. Co.* v. *Duel,* 324 U. S. 154, 160-161; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 677-678. The theory of both of these decisions is that the failure to timely raise an issue will be excused by a supervening event which might alter a prior judgment and could not

reasonably have been anticipated. In *State Farm Insurance Co.* v. *Duel, supra,* the supervening event was the holding of this Court in *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533, that the fire insurance business was commerce within the meaning of the Commerce Clause and the Sherman Act, 324 U. S. 154, 160. In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill, supra,* the supervening event was the overruling by the Supreme Court of Missouri of a decision it had made six years earlier in *Laclede Land and Improvement Co.* v. *State Tax Commission,* 295 Mo. 298, which had been consistently followed by the State Tax Commission and the Supreme Court itself in later cases, 281 U. S. 673, 676. Thus, it is clear that the term "supervening event" in this context refers to a judicial decision which could not have been anticipated and which, consequently, first gives rise to the possibility of a claim thereunder.

In re Ruffalo, supra, upon which petitioner relies, clearly was not such an event. It is unnecessary to burden this Court with innumerable citations to decisions preceding *Ruffalo* demonstrating that the requirement of notice and due process has long been held to apply to disciplinary proceedings and that, consequently, the claim now advanced by petitioner could readily have been made before the decision in *Ruffalo* was announced,[2] for the proof of that proposition lies in the fact that petitioner did raise the issue now advanced on at least three occasions prior to the *Ruffalo* decision. It is respectfully submitted that he cannot now be heard to justify his abandonment of that claim after first raising it prior to the decision in *Ruffalo*

[2] See, for example, *Randell* v. *Brigham,* 7 Wall. 523, 540, cited in *Ruffalo* itself, 390 U. S. 544, 550.

upon the ground that the claim could not have been made until *Ruffalo* was decided.[3]

II.

Petitioner was not denied procedural due process.

Petitioner relies exclusively upon *In re Ruffalo, supra.* There an attorney was charged with twelve separate counts of misconduct. In the course of the subsequent hearing, the attorney testified in his own defense and, thereafter, solely on the basis of that testimony and the testimony of another witness, an additional charge of misconduct was added over the objection of the attorney's counsel. Thereafter, the Supreme Court of Ohio sustained only two of the thirteen charges, one of these being the charge added after the attorney's testimony, and suspended the attorney indefinitely.

In a subsequent disciplinary proceeding in the United States Court of Appeals for the Sixth Circuit predicated upon the state disciplinary action, the only charge considered was the one added following the attorney's testimony. This Court held that the discipline of the attorney predicated upon testimony which he had given in defense of the original charges violated procedural due

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[3] Petitioner's unwillingness or inability to recognize that issues once raised and determined cannot be indefinitely resurrected is demonstrated in a footnote to the present petition (p. 6) in which he states that in the event certiorari is granted he will request leave to argue that the disbarment order should be reversed "because based upon inculpatory evidence obtained from [him] by coercion in violation of the self-incrimination prohibition of the Fifth Amendment," the very claim which was the subject of his prior petition for certiorari which was denied by order of this Court on January 15, 1968, more than eighteen months ago.

process in that the attorney "had no notice that [the conduct admitted in his testimony] would be considered a disbarment offense until *after* both he and [a witness] had testified at length on all the material facts pertaining to this phase of the case", 390 U. S. 544, 550-1.

Petitioner now contends that the referee's reference to an assignment (Ex. 50) issued by him and antedated to give it priority over an assignment issued by petitioner to his clients as "fraudulent" constitutes a similar violation of procedural due process inasmuch as the charges were not predicated upon the assignment. We respectfully submit that the situation in *Ruffalo* is not even remotely similar.

No charges were added in this proceeding predicated upon petitioner's testimony and, in fact, the opinion of the Appellate Division disbarring petitioner clearly indicates that it considered the charge solely as originally made in the petition.[4] It is clear, therefore, that the evidence concerning the various assignments was not considered as a separate charge but only with respect to its relevance to the existing charge of conversion.

The assignments and the circumstances surrounding them were relevant to the pending charge in two principal respects. First, the nature and extent of restitution is always relevant to a charge of conversion, *Matter of O'Doherty,* 14 A. D. 2d 4, 10; affirmed 11 N. Y. 2d 1028. Thus, petitioner himself took the position that the assign-

[4] "The final charge, sustained by the Referee, as were the others referred to, was that the respondent [petitioner here] converted to his own use without authority the sum of $5,275 representing his client's share of a settlement in a personal injury action. The evidence amply supported the Referee's findings and the report is confirmed", *Matter of Kaufman,* 25 A. D. 2d 48, 49.

ment issued to his clients (Ex. 36) constituted payment of their share of the settlement proceeds justifying the filing of a closing statement concluding the underlying case. The existence of the "fraudulent" assignment (Ex. 50) impeached that claim by demonstrating that it predated the assignment to the clients thereby, together with assignments against the same loss issued to others, using up all the proceeds and rendering the assignment issued to the clients worthless (Referee's report, p. 32). Secondly, the "fraudulent" assignment (Ex. 50) was witnessed by Manente, the same individual who appeared in the course of the disciplinary proceeding as a witness for petitioner and testified that he was present when one of the clients agreed to lend petitioner the clients' full share of the settlement, a conversation which the client denied had ever taken place. Consequently, the fact that Manente had on a prior occasion witnessed an assignment falsely dated by petitioner was highly relevant to assessing Manente's credibility. In fact, it was in the course of rejecting Manente's testimony, that the referee referred to the assignment as "fraudulent" (Referee's report, p. 34).

The obvious relevance of the assignment and testimony relating thereto in the context of the evidence received with respect to the charge as framed is demonstrated by the fact that petitioner, unlike the attorney in *Ruffalo*, made no objection to receipt and consideration thereof by the referee in the course of the hearing and did not advance the present claim in the course of the proceedings in the Appellate Division with respect to respondent's motion to confirm the report of the referee made following the filing of the referee's report and service of a copy thereof upon petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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